

(25)

FILED

NOV 20 1942

CHARLES SUMNER CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 535

PARAGON LAND CORP.,

Petitioner,

v.

JOSEPH P. DAY and BRADLEY DELEHANTY,
Trustees, etc.,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE
OF NEW YORK.**

SAMUEL OKIN,
Attorney for Petitioner,
#32 Broadway,
New York City.

INDEX.

PETITION :

	PAGE
Opinion below	2
Statutes involved	2
Questions presented	4
Jurisdiction	5
Statement	6
Specification of errors to be urged	11
Reasons for granting the writ	13

SUPPORTING BRIEF :

Opinions below	15
Jurisdiction	15
Statement of the case, questions presented, statutes involved, etc.	15

Argument :

1 (a) There being no judicial sale involved, the summary proceedings in the New York State Courts without any statutory authority therefor, and the denial to the petitioner of a hearing, argument and opportunity to present evidence on a triable issue of fact involving property rights, constituted a deprivation by the petitioner of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States ... 15

1 (b) The real property which was the subject matter of the said contract of sale was owned by the County of Nassau and was not in the possession or under the control of the Court. The agreement and the stipulation, if they have any legal significance, constituted a private sale, if any, and not a judicial sale 18

Conclusion 24

TABLE OF CASES CITED.

	PAGE
Christie v. Gage, 71 N. Y. 189, 194	22
Commonwealth Co. v. Bradford, 298 U. S. 468, 480	21
Home Tel. & Tel. Co. v. City of Los Angeles, 227 U. S. 278	17
Kenaday v. Edwards, 134 U. S. 117, 125	21
Matter of Lawyers Mortgage Company, 284 N. Y. 325 ...	24
Morgan v. United States, 298 U. S. 468	17
National Labor Board, In re, 304 U. S. 486	17
New York Life Insurance Company v. Gutttag Corp., 265 N. Y. 292	18
Ochoa v. Hernandez, 230 U. S. 139	17
Saunders v. Shaw, 244 U. S. 317	17
Shields v. Utah, Idaho R. Co., 305 U. S. 177	17
Williamson v. Berry, 49 U. S. 495, 554	20

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .

PARAGON LAND CORP.,

Petitioner,

v.

JOSEPH P. DAY and BRADLEY DELEHANTY,
Trustees, etc.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Petition.

Petitioner, Paragon Land Corp., prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York dated the 25th day of June, 1942, making the order and judgment of the Court of Appeals of the State of New York, the order and judgment of the said Supreme Court.

Opinion Below.

The Court of Appeals affirmed the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, in so far as this petitioner is concerned, in an opinion reported in 288 N. Y. 270. The said Appellate Division and the lower Court rendered no opinions.

Statutes Involved.

The statutory jurisdiction of the Supreme Court of the State of New York as provided for in Chapter 745 of the Laws of New York for year 1933 (commonly known as the Schackno Act) and Chapter 19 of the Laws of New York for year 1935 (commonly known as the Mortgage Commission Act) are referred to in the petition. The pertinent sections of the said Statutes are as follows:

Section 8 of Chapter 745 of the Laws of 1933 provides:

“JURISDICTION OF SUPREME COURT. The supreme court of the county in which any such guaranty corporation has its principal office is hereby vested with jurisdiction and authority to determine the fairness of any plan or agreement which may be promulgated hereunder with respect to any mortgage investments sold or guaranteed by such guaranty corporation and to approve, modify or disapprove the same. Such court shall make an order approving, modifying or disapproving such plan or agreement. In the event that the court shall have approved or modified such plan or agreement; and if at the time of the entry of such order the court shall have been satisfied that sixty-six and two-thirds percentum of the holders in principal amount of such mortgage investment or their duly authorized agent have approved such plan or

agreement, such order shall recite such fact, and shall thereupon be binding upon all the holders of such mortgage investments and the guaranty corporation which shall have sold or guaranteed them and all of the parties interested therein. If at the time of making such order such percentage of the holders of such mortgage investment shall not have approved the same, such order shall provide that upon satisfactory proof of the fact that sixty-six and two-thirds percentum of the holders in principal amount of such mortgage investments shall have approved the same, a further order may be entered ex parte approving such plan or agreement, which further order shall be binding upon all the holders of such mortgage investments and upon the guaranty corporation which shall have sold or guaranteed the same and upon all other parties interested therein."

Article VII of Chapter 19 of the Laws of 1935 refers to the Jurisdiction of the Supreme Court. Section 11 of said Chapter as contained in said Article is as follows:

"THE COURT TO PASS UPON PROPOSAL OR PLAN. The supreme court for the county in which a guaranty corporation has or had its principal office is hereby vested with jurisdiction and authority to determine the fairness of any proposal or plan which may be promulgated hereunder with respect to any mortgage investment guaranteed by such guaranty corporation and to approve, modify or disapprove the same, provided, however, that where the underlying security or securities, property or properties affected by such proposal or plan is or are located within one county, then the supreme court held in such county shall have such jurisdiction. In considering such proposal, the court or a referee appointed by the court shall determine whether such proposal or plan is fair, reasonable and equitable to the holders of mortgage investments and

whether it meets their best interests. If a referee be appointed he shall report his determination for confirmation or modification upon such notice as the court shall direct. Nothing herein contained shall affect the jurisdiction of the supreme court held in any county with respect to any proceeding pending in such court at the time this act takes effect."

Section 13 of said Chapter 19 of the Laws of 1935 provides:

"**APPOINTMENT OF COMMISSION AS TRUSTEE.** In passing upon any proposal or plan or agreement proposed under this act or under chapter seven hundred forty-five of the laws of nineteen hundred thirty-three, the court may appoint the commission to act as trustee, substitute or successor trustee."

Section 17 of said Chapter 19 of the Laws of 1935 provides:

"**GENERAL POWERS OF COURT.** The court shall also have jurisdiction to make orders in respect of any and all matters as to which court action is hereby provided and to make orders upon the petition of the commission, or of any other interested party, to enforce any provision of this act."

Questions Presented.

I.

Was the said order made by the Special Term of the Supreme Court, affirmed by the Appellate Division, violative of, and repugnant to, the Fourteenth Amendment of the Constitution of the United States, insofar as the petitioner was concerned?

II.

Did the agreement made by the trustees, appointed by the Supreme Court of New York in reorganization proceedings pursuant to Chapter 745 of the Laws of 1933 (commonly known as the Schackno Act) and Chapter 19 of the Laws of 1935 (commonly known as the Mortgage Commission Act), for the sale of land to the petitioner which land the trustees did not own but was owned by the County of Nassau, and which agreement was approved by a Justice of the said Supreme Court, constitute a judicial sale?

III.

A controversy having arisen between the trustees and the petitioner with respect to said agreement, did a Justice of the Supreme Court of the State of New York presiding at Special Term of said Court have jurisdiction to summarily make an order directing the petitioner to complete its purchase in disregard of the timely objection of the petitioner that it was being deprived of its property rights without due process of law in violation of the Constitution of the United States?

Jurisdiction.

In the remittitur of the Court of Appeals appears the following:

“A question under the Constitution of the United States was presented and necessarily passed upon. The appellants argued that the orders made by the Special Term of the Supreme Court, affirmed by the Appellate Division, are violative of, and repugnant to, the Fourteenth Amendment of the Constitution of the United States. This Court held that said order of the Special

Term of the Supreme Court, affirmed by the Appellate Division, are not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States, insofar as Paragon Land Corporation was concerned."

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C., Section 344(b)]. The time for the petitioner herein to apply for this writ was extended by the orders of Associate Justice Stanley Reed, dated September 23rd, 1942 and October 21st, 1942, to and including November 24th, 1942.

Statement.

The facts material to this application are as follows:

In 1936, the respondents together with Frederick R. Crane, now deceased, were appointed trustees, by a final order made by a Justice of the Supreme Court of the State of New York, of a consolidated certificated bond and mortgage covering certain real property in Nassau County, State of New York, in reorganization proceedings instituted by the Mortgage Commission of the State of New York pursuant to Chapter 745 of the New York State Laws for the year 1933 and Chapter 19 of the New York State Laws for the year 1935. The trustees duly qualified, filed a declaration of trust substantially in the form required by the order appointing them, and the aforesaid bonds and mortgages, as consolidated, were thereupon assigned to the trustees. Thereafter, the trustees foreclosed the bond and mortgage, consolidated as aforesaid, and became the owners of the mortgaged premises in 1938 (R. 9-10).

Prior to the appointment of the said trustees, the County of Nassau, State of New York, had sold the twelve tax parcels of real property (consisting of the trust property)

for non-payment of taxes and on said tax sales the said County of Nassau purchased eleven of the said twelve parcels and on the 14th day of October, 1939, became the owner thereof (R. 10-11).

Negotiations were thereafter entered into between representatives of the trustees, the Paragon Land Corp. and representatives of the County of Nassau, as a result of which a stipulation was signed by the attorneys for the trustees and ~~and~~ the attorney for the County of Nassau, subject to the approval of the Board of Supervisors of Nassau County and the Supreme Court, for the sale of certain property by the County of Nassau to the trustees, which said stipulation was annexed to and made part of a written agreement entered into between the trustees, as sellers, and the Paragon Land Corp., as purchaser, for the sale of said real property mentioned and described in said agreement for the sum of Three hundred thousand (\$300,000) Dollars. *In the agreement and stipulation, time was made of essence* (R. 67, Vol. I).

At the time the agreement and stipulation were made, the trustees had no title to the property, which formerly formed the trust estate as the tax liens upon it had been sold and title to the property was acquired by the County of Nassau as hereinbefore stated.

The stipulation and agreement were approved by the Court by an order which terminated the proceeding commenced by the trustees on March 20, 1939 for instructions (R. 96-99, Vol. I).

The agreement provided that title was to close on April 15th, 1940 (R. 40, 63, Vol. I) on which date the trustees were not the owners of the said property which was the subject matter of the agreement and in addition the Board of Supervisors of Nassau County had not ratified and approved the said stipulation providing for the conveyance of the premises on the payment of the consideration therein provided for. The trustees were therefore not in a posi-

tion to give title and the closing was adjourned to April 22, 1940, title to close as of April 15th (R. 25, Vol. I).

On April 22nd, 1940, the trustees were again unable to give title, as the Board of Supervisors of Nassau County had not ratified and approved the said stipulation, and on that day the Paragon Land Corp. tendered the sum of \$75,000.00 in certified checks, pursuant to the agreement (R. 103-104, Vol. I).

The trustees claimed that the tender was incomplete and that the closing was adjourned and that thereafter on May 6th, 1940, the Paragon Land Corp. refused to take title pursuant to a notice served (R. 28, Vol. I).

The Paragon Land Corp. claimed that since time was of the essence in its agreement with the trustees, and since at the time set for the closing it had tendered all the money required to be paid, that it was therefore relieved from further performance (R. 104-105, Vol. I).

A controversy arose between the trustees and the Paragon Land Corp. with respect to said agreement and the respondents submitted affidavits to a Justice of the Supreme Court of the State of New York upon which said Justice made an order to show cause directed not only to the petitioner, Paragon Land Corp., but also to Morris Walzer, Louis Weinstock and Harold J. Weinstock, who had made no agreement whatsoever with the trustees, requiring them to show cause at a Special Term of the said Supreme Court, why an order should not be made requiring Paragon Land Corp. to carry out and perform the contract, a copy of which was annexed to the said affidavits, and to complete the purchase thereunder, and why it should not be decreed that Paragon Land Corp. was organized solely for the purpose of acting as a mere agency or instrumentality of Morris Walzer, Louis Weinstock and Harold J. Weinstock, or either of them that the corporate identity of Paragon Land Corp. be disregarded in order to prevent loss to the certificate holders mentioned in the annexed affidavits and so that the rights and interests of such certifi-

cate holders may be protected and in the interests of justice, and why it should not be decreed that Morris Walzer, Louis Weinstock and Harold J. Weinstock, or either of them that the corporate identity of Paragon Land Corp. be disregarded in order to prevent loss to the certificate holders mentioned in the annexed affidavits and so that the rights and interests of such certificate holders may be protected and in the interests of justice, and why it should not be decreed that Morris Walzer, Louis Weinstock and Harold J. Weinstock, or any of them, are the real parties in making the aforesaid purchase, that they, and each of them, be required to furnish the consideration necessary to consummate the aforesaid contract (R. 7-68).

The petitioner herein, Paragon Land Corp., and the said Morris Walzer, Louis Weinstock and Harold J. Weinstock, filed a petition with the Appellate Division of the Supreme Court of the State of New York, Second Department, wherein they sought a prohibition order against the said Justice of the Supreme Court of the State of New York with respect to said order to show cause on the ground that there was no jurisdiction to make the same or to hear the subject matter thereof, which motion was denied by the said Appellate Division in the exercise of discretion (R. 71-72).

When the motion brought on by said order to show cause appeared for argument before another Justice of the Supreme Court, the petitioner herein, Paragon Land Corp., and the other persons mentioned in said order to show cause, Morris Walzer, Louis Weinstock and Harold J. Weinstock, appeared specially and objected to the jurisdiction of the Court and submitted affidavits wherein they claimed that the due process clauses of the Constitutions of the State of New York and United States were being violated (R. 101-116).

The said Justice of the Supreme Court made an order granting in all respects the motion made as aforesaid and

which said order contained the following provisions (R. 4-6):

“Ordered, that Paragon Land Corp. be and it hereby is directed to carry out and perform, as of May 6, 1940, the contract, a copy of which is annexed to the papers upon which said order to show cause was made, and which contract bears date March 18, 1940, and is made by Joseph P. Day, Frederick R. Crane and Bradley Delehanty, as Trustees for Certificate Holders of Series or Guarantee No. 171038 of the Bond and Mortgage Guarantee Company, under a Declaration of Trust dated the 1st day of June, 1936, as sellers, and Paragon Land Corp. as purchaser; and it is further

Ordered, that Paragon Land Corp. was organized solely for the purpose of acting as an agency or instrumentality of Morris Walzer, Louis Weinstock and Harold J. Weinstock as a syndicate of purchasers and the real parties making the purchase through said contract of March 18, 1940, and who represented to the Court that they were acting through such corporation as a responsible and financially able purchaser; and it is further

Ordered, that said Morris Walzer, Louis Weinstock and Harold J. Weinstock, and each of them, be and each of them hereby is directed to furnish the funds and consideration necessary to consummate the aforesaid contract”.

The petitioner herein, Paragon Land Corp., and the said Morris Walzer, Louis Weinstock and Harold J. Weinstock, appealed to the Appellate Division of the Supreme Court of the State of New York, Second Department, from the aforesaid order and the said Court on June 9th, 1941, unanimously affirmed the said order without opinion (R. 136-138).

The Court of Appeals of the State of New York granted permission to the petitioner herein, Paragon Land Corp.,

and the said Morris Walzer, Louis Weinstock and Harold J. Weinstock, to appeal from the said order of the said Appellate Division, and the said Court of Appeals on the 5th day of June, 1942, made its remittitur wherein it is recited that the said Court of Appeals did order and adjudge that the order be affirmed in so far as it granted the application to compel the corporate appellant to complete its purchase; and that the order was reversed in so far as relief is granted against the individual defendants; that a question under the Constitution of the United States was presented and necessarily passed upon; the appellants argued that the order made by the Special Term of the Supreme Court, affirmed by the Appellate Division, are violative of, and repugnant to, the Fourteenth Amendment of the Constitution of the United States; the Court of Appeals held that said order of the Special Term of the Supreme Court, affirmed by the Appellate Division, is not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States, in so far as Paragon Land Corporation was concerned (R. 1, 11-13, Vol. III).

This writ is sought only by the petitioner as against whom the Court of Appeals affirmed said order of the Appellate Division of the Supreme Court.

Specification of Errors to be Urged.

The Court of Appeals erred

1. In holding that the Supreme Court had jurisdiction to grant a summary order directing the Paragon Land Corp. to complete its purchase, and that the Appellate Division did not err in affirming said order.

2. In holding that the Paragon Land Corp. in entering into an agreement with the trustees for the purchase of land which the trustees did not own, submitted itself, at

least to that extent, to the jurisdiction of the Court and became a party to the proceeding.

3. In holding that because the statutes (Laws of 1933, Ch. 745 as amended and Laws of 1935, Ch. 19) by necessary implication confers upon the Court at Special Term jurisdiction over sales made by trustees from inception to completion, that the voluntary entering into an agreement by Paragon Land Corp. with the trustees for the sale of land which they do not own but which is owned by the County of Nassau, State of New York, and which agreement provides that it is subject to the approval of the Court, constitutes a submission by the Paragon Land Corp. to the jurisdiction of the Court to give summary directions compelling it to complete its purchase.

4. In holding that the agreement between the trustees-respondents and the Paragon Land Corp. for the sale of land which said trustees did not own, approved by the Court constituted a judicial sale, and that although the trustees are not to be regarded in all respects as officers of the Court and that the trust property is not, in full sense, in the custody of the Court that none the less, the property is brought into the protective arm of the law and the trustees are subject to the directions of the Court and since the said statutes by necessary implication confers upon the Court at Special Term jurisdiction over the sales made by the trustees from inception to completion, and because Paragon Land Corp. voluntarily entered into such a sale, subject to the approval of the Court, that said Paragon Land Corp. has submitted itself to the jurisdiction of the Court to give summary directions compelling it to complete its purchase.

5. In not holding that the agreement for the sale of property by the trustees to the Paragon Land Corp. which they did not own, the said trustees not being officers of

the Court and the property not being subject to the jurisdiction of the Court, that the said agreement even though it was approved by the Court did not constitute a judicial sale.

6. In not holding that the denial to the petitioner of an opportunity to present evidence on a triable issue of fact involving property rights is a denial of due process of law as guaranteed by the constitution of the United States.

7. In affirming the order of the Appellate Division of the Supreme Court affirming the order of the lower Court.

Reasons for Granting the Writ.

While the brief hereto annexed presents in more amplified form, the reasons relied on by petitioner for the allowance of the writ, these reasons may be summarized as follows:

1. Special Term of the Supreme Court, State of New York, erred in holding that the agreement between the trustees and the petitioner for the sale of land which the trustees did not own and which was owned by the County of Nassau, State of New York, which agreement was approved by the Court, constituted a judicial sale and on a motion without the commencement of any action, and without any trial, and over the objections of the petitioner who appeared specially and objected to the jurisdiction of the person of the petitioner and the property involved, the said Supreme Court summarily directed the petitioner to complete its purchase. The Appellate Division of the Supreme Court affirmed said order and the Court of Appeals affirmed the order of the Appellate Division in so far as this petitioner was concerned. The petitioner has been deprived of its property rights without due process of law in violation

of the Fourteenth Amendment of the United States Constitution.

The determination of the Court of Appeals is in conflict with the decisions of this Court and the Court of Appeals must have disregarded the decisions of this Court in making its determination.

It is submitted that the issues involved present questions of vital public and national importance. The present conflict between the decisions of this Court and that of the Court of Appeals, we respectfully submit warrant an examination and review of the judgment of the Supreme Court of the State of New York dated June 25th, 1942, which makes the order and judgment of the Court of Appeals the order and judgment of the Supreme Court.

Dated, New York, November 19th, 1942.

SAMUEL OKIN,
Attorney for Petitioner.